

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
HESS, et al., : Docket #21cv4099
 : 1:21-cv-04099-AT-RWL
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 Plaintiffs, :
 :
 - against - : New York, New York
 : November 30, 2021
 BED BATH & BEYOND, INC., :
 :
 Defendant. :
 :
 ----- : DISCOVERY CONFERENCE

PROCEEDINGS BEFORE
HONORABLE ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

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INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE CLERK: We're here in the matter for a discovery conference, 21cv4099, Donald Hess and Elizabeth Padilla versus Bed Bath & Beyond Inc. Attorneys, please state your name for the record starting with plaintiff.

MR. STEVEN MOSER: Steven Moser for the plaintiff, good morning, Your Honor.

HONORABLE ROBERT W. LEHRBURGER (THE COURT): Good morning.

MR. JEFFREY RUZAL: Good morning, Your Honor, for defendant, Jeffrey Ruzal and Matthew Aibel.

THE COURT: All right, good morning. And feel free to speak while you're seated it's fine with me and I think it's more comfortable usually than having to bend over, but it's up to you.

The reason I wanted to meet in person and have a conference here is A) that's like old times and it's nice to actually have proceedings in court, but B) this is fairly substantive in some ways even though it's related, all related to discovery, but potentially class certification, and I thought it made sense for us to be able to talk live.

So based on the correspondence, to me it seems like there are three overall issues that are sort of bubbling through the correspondence. One is regarding scheduling, the second is regarding sampling for class

discovery, and the third are the adequacy of the defendants' responses to discovery requests. And I realize all three of these are sort of tied together but they're just three things I'd like to see us try to resolve by the end of the discussion. So really I think the first thing that needs to be discussed is the sampling issue and I just want to establish a couple of things.

First of all, plaintiff has, I'm sorry, defendants have represented that to the extent they want to do sampling it would be for class certification only and not for merits discovery, is that right?

MR. RUZAL: Correct, Your Honor.

THE COURT: All right. And, and so that if there, if a class was certified, the defendants would be producing documents for all of the putative class, is that right?

MR. RUZAL: Yes, Your Honor.

THE COURT: Okay. And if we do sampling or you do sampling, do you, what is your position with respect to representativeness, you would be accepting it as representative, you'd be reserving the right to challenge it, what would be your view on that?

MR. RUZAL: So, Your Honor, as we have indicated to plaintiff's counsel before and in our, in

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2 our correspondences to the Court, we would not be
3 challenging the representativeness of the sample,
4 itself, vis-à-vis the larger class.

5 THE COURT: Okay, and we can discuss that to
6 the extent plaintiff has concerns about it. But what
7 it seems to me, based on the papers, is the defendants
8 have presented quite a bit of authority as to use of
9 sampling in class certification. Plaintiff doesn't really
10 seem to reject that law, but basically seems to be arguing
11 that in this instance there's no need for it and that the
12 affidavit that was presented by the defendants doesn't
13 support doing it here, let me ask plaintiff, is that a fair
14 characterization of how you view things?

15 MR. MOSER: In part, Your Honor, I think that
16 it's largely correct. I just want to point out that
17 the overwhelming majority of the case law that is
18 cited by the defendant has nothing to do with class
19 certification. Seven out of the ten cases that they
20 cite have to do with a plaintiff's motion for a
21 protective order preventing a defendant from taking
22 individualized discovery from an entire FLSA
23 collective.

24 THE COURT: Oh, okay.

25 MR. MOSER: So seven out of the ten cases out

1
2 of the box have nothing to do with class
3 certification.

4 The other cases, the two cases, there are
5 three other cases that, that don't, that they cite
6 that don't necessarily address the use of sampling in
7 establishing class certification. And there's no real
8 analysis in those cases, and one case is especially
9 concerning and that's the case of *Madeira against*
10 *Concourse -- Converse*, better said, where the
11 plaintiffs first persuaded the judge that a
12 representative sample would be suitable for the
13 purposes of class certification, and then it was, and
14 then when the plaintiffs actually moved for class
15 certification of rounding claims, the Court denied it
16 and said the soul basis for the allegation of the
17 rounding claims is a statistical analysis of a sample
18 payroll data over 60 employees. The Court found that
19 the rounding policy undercounted hours, but for each
20 class member it could not definitively say whether the
21 rounding policy benefitted the employee or prejudiced
22 the employee, so it couldn't be used for the purpose
23 of class certification.

24 And our big concern in this case is twofold.
25 First, in the declaration they say that it could take

1
2 as little as three days to produce all of the relevant
3 ESI.

4 THE COURT: For the electronic documents.

5 MR. MOSER: For the electronic. So for me it's
6 the fact that it hasn't yet been produced is really
7 concerning. We think that is complete speculation
8 with regard to the other burden because the affiant
9 doesn't say that she ever went to the store. She
10 doesn't say that she looked at the files, she doesn't
11 say how many pages are in them. She doesn't say what
12 her estimate of this half hour for a file is.

13 Assuming that, and I understand that there
14 will be an additional burden when we start talking
15 about 900 versus 135, clearly, here's the problem, we
16 don't know what these records look like at all and we
17 don't even know if they exist. So to put that in
18 perspective, the defendants haven't committed that
19 once we agree on the sample and we select a random
20 sampling of the class list, that they'll be able to
21 find performance reviews for the sample or provide
22 records regarding disability or accommodation for the
23 sample.

24 Wo when we start talking about someone who
25 requests light duty, that's not going to be every

single class member, that's not going to be all 900. It could be 100 out of the 900, it could be 50. And when we go into the sampling process and we limit it to their subsample, they go and they look and they find that there are no records in that particular sample of people who requested light duty, what do we do then? I mean do we keep on, do we then say, well, we need a larger sample and then they have to go back to all the stores and look through all the files again, it just doesn't seem to me to be tenable. And the promise is illusory because, I mean, we asked them basically in our letter to the Court, you know, what do these records look like, will they be useful for class certification at all?

And I still don't know what these documents are, I haven't seen them, haven't seen a sample performance evaluation and, frankly, with regard to performance evaluations, and this will be the last thing that I say, actually I hate to say that, there will be one more thing that I have to say after that, but with regard to performance evaluations, our burden in this case is to prove that these are manual workers, right? And because they were manual workers, they weren't paid on time. Now, I could have someone

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2 at a Burger King, for instance, who's working at the
3 front counter who's constantly helping out in the
4 kitchen, and he might be, his, his primary performance
5 evaluations might be based upon how he interacts with
6 the public. So what does that have to do with whether
7 he's a manual worker or not, you know, it just doesn't
8 make any sense to me.

9 The second issue is that, you know, they talk
10 about this, this paper system that was in place until
11 June of 2018, and then after June of 2018 there's an
12 electronic system, but they haven't explained anything
13 about what records exist in the files after June of
14 2018, why they haven't been produced, what the burden
15 associated with producing them was, it's almost as if
16 they ignore everything after June of 2018 when they
17 converted to an electronic system --

18 THE COURT: Well when does the relevant time
19 period end?

20 MR. MOSER: It ends I believe in October or
21 November of 2018.

22 THE COURT: Okay.

23 MR. MOSER: So, um, so that's the short of it,
24 Judge. You know, it seems like in the defendant's
25 mind that this is a, they'll make this proffer and

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2 this will somehow moot all of plaintiff's discovery
3 requests without even a motion being made or without
4 the plaintiffs having our opportunity to be heard on
5 the, on the need for discovery on their, you know, 84
6 document requests. I think that's what they're
7 suggesting and I think it's a violation of due process
8 if they're suggesting that somehow this short circuits
9 the entire discovery process by them saying, well,
10 we'll give you two items, you know, and then we look
11 at the two items and they're not even viable to
12 established class representation, then we come back to
13 the Court in another six months with still nothing
14 done.

15 THE COURT: And, well, it's not clear to me,
16 and they'll answer, that the defendants will answer that
17 they were necessarily saying the examples of relevant
18 records they mentioned were the only ones they anticipated
19 producing. But somewhat related to that, I think we need to
20 keep in mind two different maybe related issues. One is the
21 relevancy and responsiveness of the documents, are there
22 documents that are going to reflect on whether these
23 employees essentially had to do more than light labor,
24 versus the extent to which those documents are
25 produced on a sampling basis or not a sampling basis.

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2 I understand your point that among the files we don't
3 know right now how consistent they are across file to
4 file to know that the, or have confidence that a
5 sample would provide the type of documents that you
6 may have in mind or that would provide the
7 information. But it may be that there's other
8 documents that would provide the relevant information
9 and I don't know that either.

10 But let me turn it over to the defendants,
11 have them explain what they have in mind in responding
12 to I think the concerns that you've raised.

13 MR. RUZAL: Thank you, Your Honor, and mindful
14 of the Court's time, shall I address all of Mr.
15 Moser's points, I was thinking of maybe doing it sort
16 of in various buckets of the case law issue and then
17 what we get down to is the affidavit, et cetera?

18 THE COURT: That's fine.

19 MR. RUZAL: Thank you, Your Honor. Briefly on
20 the case law, not to dwell too much, I understand how
21 Mr. Moser's distinguishing the cases that we presented
22 to Your Honor. The bottom line is, is that whether
23 it's in support of a class action or a collective
24 action which we all know is quite similar, sampling is
25 a reasonable protocol when it's specific to the case

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2 at issue. I'm not suggesting through our
3 correspondence to the Court that every case is
4 necessarily appropriate for sample discovery, we just
5 happen to think that in this case it is.

6 Your Honor had asked us to, to speak on the
7 particular burden with respect to a smaller sample
8 vis-à-vis the larger class size of 907. We believe we
9 absolutely did so. You know, Ms. Juroff (phonetic),
10 who's the affiant, to travel to 65 stores and
11 personally inspect file cabinets filled with personnel
12 documents would have been impossible within the time
13 allotted for us to put in an affidavit. If, at some
14 point, the Court wishes for us to select someone to
15 actually speak to each of the files in question, than
16 that would be one thing.

17 We can't speak at present what's in each
18 individual file, we're only going on the affiant's
19 understanding based as the HR director for the
20 defendant. She's been in that role for quite some
21 time and she has a good understanding of what
22 typically is comprised of personnel documents. To the
23 extent that it's not as robust as what Mr. Moser would
24 have liked, that does not mean that he's not entitled
25 to additional discovery.

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2 Speaking to his last point, we, in no way, are
3 trying to supplant Mr. Moser's requests, 85
4 individualized requests for documents with this
5 sampling protocol for a couple of documents that Ms.
6 Juroff in her affidavit spoke to as potentially
7 relevant that typically are in such personnel files.
8 That does not mean that it's limited to that,
9 whatsoever, we just happen to believe that going
10 through a sampling protocol such that we can produce
11 such documents would be a more efficient way for
12 purposes of class certification. To the extent the
13 class is certified, as Your Honor had asked before,
14 yes, of course, there would be further document
15 production and individualized depositions, and et
16 cetera, with respect to the remaining class members,
17 if Mr. Moser wishes to engage in such individualized
18 discovery at that point.

19 THE COURT: All right, so let me inquire on a
20 few things. First of all, is your thought that if you
21 proceeded with sampling, or even if you didn't, you'd
22 be producing all documents that you deem relevant and
23 responsive from within those files at the individual
24 stores as opposed to, say, just two categories of
25 documents?

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MR. RUZAL: Yes, Your Honor.

THE COURT: All right, so the parties would have to work out any objections to the extent they may affect collection, whether it be sampling or not, I think in advance, so that we'd be assured of getting all relevant documents one way or the other. So I think the issue of the two type of documents that were culled out as an example is sort of something that doesn't need to occupy us too much because they're going to produce documents beyond that. Do I have that right, Mr. Moser?

MR. RUZAL: Mr. Ruzal, yes, Your Honor.

THE COURT: I'm sorry, okay. All right, but let me ask you this, so each store, does each store have a manager? Well who is the highest in the chain at, that's onsite at each store?

MR. RUZAL: So that would be the store manager.

THE COURT: Okay, and does the store manager deal with anything related to employment issues or HR issues?

MR. RUZAL: You know, I would have to ask the client, Your Honor, I'm not quite familiar. Obviously, there's corporate human resources, I don't

1
2 know if there's designated, I mean there are
3 designated HR resources, as Ms. Juroff explained in
4 her affidavit, for particular stores. I suppose in
5 particular jurisdictions, here as to New York. I don't
6 know if the HR representative works in tandem with the
7 store manager or the store manager has any delegated
8 responsibilities, that's certainly something I can
9 inquire about.

10 THE COURT: All right. Well I did a
11 calculation using your numbers, but I did a different
12 calculation. So my calculation was that you had a
13 total of 454 hours, but if I take that 454 hours and
14 divide by 65 stores, and I realize some are out of
15 business and some came online after, but putting that
16 aside, if you divide by 65 you get 7 hours per store
17 that would be used to search for and collect the
18 documents. And my question is, why can't someone at
19 the store, each store, under the guidance of someone
20 back at corporate, do the collection and simply copy
21 the documents and forward them to, you know, a central
22 place?

23 MR. RUZAL: The only thing I could speculate
24 on, Your Honor, and, quite frankly, it is speculation,
25 is I don't know what the resource allocation is at the

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2 store level which is to say I don't know that someone
3 for staffing purposes who is dealing with customers or
4 dealing with operational issues at the store level,
5 are in a position to be able to spend that kind of
6 time collecting documents at each particular store.
7 I'm sure it can be done and I'm sure the client, Bed
8 Bath & Beyond, would have to designate certain
9 individuals for those duties and then supplement with
10 other, you know, individuals at the store to be able
11 to deal with customers and the like. To me, I don't
12 know that that makes much of difference timewise,
13 other than the fact that the person might very well be
14 local as opposed to sending someone centrally from HR
15 to be able to collect those documents.

16 THE COURT: Well, it disburses the hours so
17 that no one person is out of commission for 20 or 21
18 days as you suggest might otherwise happen.

19 Also, I, this is an assumption, but I haven't
20 seen anything to the contrary, that that's what would
21 happen anyway. That someone central to corporate would
22 say, okay, send me the files for these two individuals
23 from your store, and essentially doing the same thing
24 that would be required to send more files. And
25 there's nothing in the affidavit that really indicates

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how much there is in each file that would create a burden. I understand, I appreciate the estimate of time, so I'm working off of that and, like I said, it basically comes down to seven hours per person per store.

Address the issue, if you will, of the plaintiff's concern that the, producing documents from two individuals isn't really, even though you will say it's representative for purposes of class certification, it may not really be representative in the sense that one person's file might indicate they were doing a certain type of work, and another file just may not address that issue. Can you, what can you say about what would give confidence that the two files produced from each store would really be a representation of the extent to which the employees conducted light duty or heavy duty?

MR. RUZAL: Yes, Your Honor. So, as we were saying before, the documents in the personnel files are not necessarily limited to the examples that we provided in Ms. Juroff's affidavit and which Mr. Moser and I discussed with the Court this morning. There may very well be other types of documents which I'm not presently aware of, which might aid Mr. Moser's

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2 argument with respect to whether or not the putative
3 class members in question were manual workers or not
4 for purposes of New York Labor Law 191. And to the
5 extent that that might exist in certain files and not
6 others would be something that would have to be a
7 moving process. I mean to the extent that there is
8 additional information in certain other files and Mr.
9 Moser wished for us to supplement it with additional
10 discovery for other individuals, that would certainly
11 be something we were open to. We're not looking to
12 impede Mr. Moser's ability to make his motion for
13 class certification, we're just trying to address this
14 in somewhat of a, you know, a way that, you know,
15 lessens the burden, if you will, on what would be a
16 significant exercise for the client.

17 THE COURT: Sure. Okay, on the electronic
18 production, that's of, as I understand it there are
19 two databases that don't have the title in them so
20 there would have to be manual going through and
21 checking per employee and you indicate that that would
22 take three to four days which, frankly, doesn't seem
23 particularly burdensome. And if the person is going to
24 have to go through the list anyway to find 130 names,
25 it doesn't seem to me there is any different burden in

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2 going through to find 960 names. I agree, it would
3 take longer because you have to either click on them
4 or have them come up on the screen, but you're still
5 going through a list or conducting a search of that
6 list by name. But, again, you've indicated that's
7 three to four days which, again, could have been done
8 some time ago.

9

MR. RUZAL: If I may clarify Your Honor?

10

THE COURT: Yes, please.

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MR. RUZAL: I mean the three to four day
12 estimate that Ms. Juroff provides in her affidavit
13 speaks to the payroll timekeeping records which
14 defendant believes is the most relevant for purposes
15 of this lawsuit, as we said in our submission to the
16 Court. A 191, a New York Labor Law 191 claim focuses
17 on what we believe to be two substantive issues, one
18 is whether or not the worker is manual --

19

THE COURT: Right.

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MR. RUZAL: And, therefore, qualifies or is
21 entitled to be paid on a weekly basis, and then what
22 was paid beyond the week to the extent, you know, that
23 damages need to be assessed for those individuals in
24 the form of liquidated damages. That is not to say
25 that there is not other potential ESI. And as Mr.

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2 Moser pointed out in his 85 document request, he is
3 seeking ESI that goes well beyond just the payroll and
4 timekeeping records. If Mr. Moser wants to stipulate
5 that all the relevant ESI, as he put it, is limited to
6 the payroll documents and the timekeeping records,
7 then that's perfectly fine and we're happy to engage
8 in that work and produce those documents for him.

9 THE COURT: All right. Okay, in other words,
10 there will be additional time spent on electronic
11 production, for sure, because there may be communal
12 documents, there may be email, whatever else it is
13 that you ultimately agree upon that the court rules
14 are responsive and to be produced.

15 MR. RUZAL: Yes, Your Honor.

16 THE COURT: Yes, okay.

17 MR. MOSER: Your Honor, if I may be heard
18 briefly on that?

19 THE COURT: Please. Sure.

20 MR. MOSER: I think the big concern is that,
21 you know, we have representations that they can't find
22 job descriptions for, you know, 1,000 people, and now
23 we hear that no one has gone through the files at the
24 store, I mean how do we know that job descriptions
25 aren't in there and yet we have this representation

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2 job descriptions don't exist. It's, to me it's
3 alarming.

4 And the other issue is that, you know, now we
5 asked for the defendants to identify the relevant
6 documents some months ago and they've just flatly
7 refused. And so now they're saying, well, the ESI
8 that we brought to the Court's attention in this is
9 not the only ESI that we have, but I'm completely in
10 the dark as to what ESI exists because they never told
11 us.

12 THE COURT: Okay, but that's separate from
13 sampling because they're not talking about that,
14 including in the sampling.

15 MR. MOSER: Yeah. And with regard to the
16 stores, you know, if it takes them seven hours to
17 produce all of the relevant documents for all class
18 members, which it sounds like their estimate is that
19 it would take seven hours at each store, we're willing
20 to wait two weeks for it or three weeks for it and
21 that would mean that, you know, one individual at each
22 store spends, you know, an hour a day going through
23 the files and in a week it's done and we have class
24 wide discovery if the Court thinks that's appropriate.
25 So I just wanted to interject that but that's all I

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have.

THE COURT: And I'm not saying it would happen that way, it's up to the defendant, they can have someone go from store to store, they can have people at the store. I understand, it would make sense that there are concerns that people at the store have responsibilities, they're already occupied, and they may not have the time or opportunity to go copy documents, or maybe they could, maybe there's overtime paid, I have no idea.

Just remind me again, what positions are we talking about, we're talking about specific positions, sales associates or others or --

MR. MOSER: We're talking about three specific positions. We're talking about retail stock associates, retail sales associates, and overnight department managers.

THE COURT: Okay. I'm -- yes, look -- go ahead.

MR. RUZAL: I'm sorry, Judge.

THE COURT: No, Mr. Ruzal, it's fine.

MR. RUZAL: Just one point of clarification. With respect to the overnight department managers, we'd indicated to Mr. Moser that there are

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2 approximately only 15 during the relevant time period.
3 Now, we're not opining on whether or not class
4 certification is appropriate at this time, but we did,
5 in fact, say that we would turn over the documents for
6 the entirety of that position. So what we're really
7 talking with sampling is about the stock associates
8 and the sales associates.

9 THE COURT: Okay. What I'm musing about is
10 really trying to figure out and, again, you all will
11 know better, really what documents would be most
12 relevant to indicating what these people actually did?
13 You mentioned payroll records, but I don't understand
14 how payroll, certainly, payroll records are relevant
15 to other issues, but in terms of what they actually
16 did to make the determination of whether they are
17 light or heavy, I'd like to know, Mr. Ruzal, what do
18 you think would actually address that, if anything?

19 MR. RUZAL: So I'll preface all my comments by
20 saying that I am not speaking specifically to any
21 documents that do or do not exist in any personnel
22 folders or otherwise. I will say this though, I do
23 not personally believe in my experience as a wage and
24 hour practitioner and formerly as a trial attorney for
25 the Solicitor's Office, relied on job descriptions or

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2 written documents for purposes of establishing what
3 someone actually does in a job, manual or otherwise.
4 The best evidence of what an individual typically does
5 is often through a deposition --

6 THE COURT: Right.

7 MR. RUZAL: In the formal sense in litigation.

8 THE COURT: I would think so.

9 MR. RUZAL: Or an interview otherwise, to ask,
10 well, what did you do in the store on any given day,
11 take us through a day in the life if you will. A job
12 description could be helpful as a baseline for sure so
13 that it gives Mr. Moser a platform from which to ask
14 questions and probe to learn about what one does and
15 doesn't do, but it's certainly not a substitute. And a
16 performance evaluation or a job description to the
17 extent that they exist, or any sort of other written
18 document that speaks to the potential or manual
19 aspects of a job are not ultimately realized. And I
20 will say for the record that to the extent Mr. Moser
21 were to put forward a document in support of a class
22 certification motion about what was manual and what
23 was not to determine whether or not it qualifies under
24 New York Labor Law 191, I would say that that's
25 insufficient and that you really do, in fact, need to

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2 probe the individual putative class member or named
3 plaintiffs to find out what they really did day to day
4 to find out whether or not they even qualified for
5 weekly pay under 191.

6 THE COURT: And what would you anticipate
7 would happen during the discovery period to, to do
8 that? Presumably, the plaintiff would seek
9 depositions of putative class members, but presumably
10 that would be done on a so-called representative basis
11 or sample basis of some sort, do I have that right,
12 Mr. Moser?

13 MR. MOSER: Correct.

14 THE COURT: And what's your view on whether
15 the best information is likely, on issue of heavy
16 versus light duty, is likely to come from depositions
17 versus other sources?

18 MR. MOSER: I think that the defendant's
19 approach is (indiscernible) in the clay, so to speak.
20 When we look at these job descriptions, for the
21 purposes of the ADA the employer normally has a list
22 of the essential functions of the job and the physical
23 requirements of the job. And the reason why the
24 employer has that is because when the employee makes a
25 request for an accommodation, they consult the

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essential functions of the job and the physical requirements to determine whether an accommodation can be made, right? So those documents concerning the essential function of these workers I think are generalized proof of what they did and what they were expected to do.

THE COURT: And is there anything that would require or, as a matter of course, result in such a document being in each employee's file?

MR. MOSER: No, but generally when we, when we talk about ADA compliance, the job description and the essential functions are the same in this type of an organization because they call come from HR.

THE COURT: Okay, but right now we don't have job descriptions, so they say, right, but I don't, but the point is that is the discovery at the store file employee level going to result job descriptions?

MR. MOSER: I have no idea, Judge.

THE COURT: Right.

MR. MOSER: And, frankly, you know, I'm completely in the dark because, you know, in July we asked for a list of the relevant documents that could, you know, that address certain issues, and we still don't have it, and now we're talking about it now. And

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2 it's, like the Court pointed out, this is entirely
3 speculation because we don't, we don't have an answer
4 from the defendants, basically, as to what documents
5 are relevant, so.

6 THE COURT: Right. Okay, let me ask this to
7 Mr. Ruzal, and I'm not saying this is what I'm going
8 to do, just in theory another option would be to say,
9 okay, do your sampling, let's get that produced and
10 see what that yields, and take a second look so that
11 if, well I don't know what the arguments would be. It
12 may be that there's somehow job descriptions that show
13 up and then those could be used across groups. There
14 may be no such thing and it's just very
15 individualistic, at which point the plaintiff says
16 what? What would, what would it take for you, Mr.
17 Moser, to say, okay, we've got these sample files and
18 I think we now need all the others for class
19 certification purposes because why?

20 MR. MOSER: I think that we would be looking
21 at what the contents of these files actually show.

22 THE COURT: Right, of course.

23 MR. MOSER: You know, for me, I could, I could
24 speculate, but I think that, again, one of the primary
25 concerns is that, again, I'm only speculating, but I

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2 would suggest that maybe only 5 out of 100 employees
3 are going to request light duty, right?

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THE COURT: Right.

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MR. MOSER: And so if we take 5 out of 100,
6 that means out of the 900 we're talking about 45,
7 right, about, 45 to 50 people --

8

THE COURT: Okay.

9

MR. MOSER: Perhaps. And when they go and
10 collect 130 out of the, out of the 900, the chances
11 that they get --

12

THE COURT: Right.

13

MR. MOSER: This 45, is really low. And then
14 what we're doing is saying, well, you didn't produce
15 anybody so go back and search again. To me --

16

THE COURT: Well they don't need to find the
17 45, they only need to find some that would then be
18 proportionally increased.

19

MR. MOSER: Yeah, that's correct. So our
20 position would be that, you know, the essential
21 functions of the job remain consistent among the
22 stores. You know, we actually, in this particular
23 case we believe that most of the other classifications
24 at the store level are manual workers. I mean they're
25 retail workers who had to stock merchandise all day

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2 long. But it, to be conservative in the case we did
3 not want to stretch outside the job, outside the job
4 categories of the individuals that we represent.

5 THE COURT: I'm still just musing about what
6 payoff there will be in having all the files, because
7 in the end, if the files really don't show much and
8 you need to depose the people anyway, and that's where
9 the information is going to come from, what does it
10 matter if you only have a certain number of files and
11 not for 960 people, right?

12 MR. MOSER: Understood. Understood. It's a
13 valid point, Judge.

14 THE COURT: And let me ask Mr. Ruzal something
15 else, something else that occurred to me was I
16 understand 14 percent and that there are cases with 10
17 percent and whatnot, but, and obviously there's a
18 burden for each additional employee that you add, but
19 one possibility would be to do a sample, but do a
20 larger sample, do five employees per store or
21 something like that, at least to give more confidence
22 that you're getting a broader number, you're not
23 undergoing as much effort and if there really is
24 something in there that would make it worthwhile to go
25 after other files for class certification purposes,

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then we could entertain that.

It did seem to me that two per store was thin, notwithstanding overall that's 14 percent, would you and your client see it as, would you still want to pursue a sampling route so called if the number were higher but not all?

MR. RUZAL: Your Honor, we're not wedded necessarily to the proposal that we provided to Mr. Moser and the Court, if it was a larger sample size that would give plaintiffs, you know, greater comfort and the Court potentially greater comfort, even if it does increase the overall percentage which we think, frankly, is already robust but, nevertheless, like I said at the outset, each case is unique in that regard so I think sampling has to take the form and follow what's most appropriate. And so not able to speak for Bed Bath & Beyond at this table, I could say realistically that we're not wedded to the proposal we provided and we would be open to a larger sample.

And if I could just add one point, Your Honor, somewhat related to the former point Your Honor made in your dialog with Mr. Moser, at the end of the day, we don't believe, necessarily, as I had said before, that the document, in and of themselves, are going to

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2 ultimately inform a motion, or the ultimate legal
3 question here is whether or not these individuals were
4 manual workers. Certainly, someone could put in a
5 request for an accommodation and, again, I'm
6 speculating, that document may not even reference what
7 the person necessarily ordinarily does in the course
8 of one's duties.

9 To the extent that there is some piece of
10 paper that speaks about what an individual class
11 member does on a day to day basis or is supposed to be
12 doing that's, again, not a substitute for what that
13 individual actually does on a day to day basis and
14 would be subject to challenge in that regard.

15 THE COURT: Right. Mr. Moser, what would you
16 think of going with an increased number for a sample,
17 say around five?

18 MR. MOSER: I would be, you know, I'm not
19 clairvoyant but I see where the Court is going. So I,
20 I'd be open to five per store, I think that that's a
21 reasonable number and considering the fact that with
22 the current proposed sample we might not have that
23 much overlap over those who request the
24 accommodations, I think that five per store would
25 definitely help us. Especially because when you start

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2 talking about, you know, the sampling, we don't know
3 what's going to be in the files. And having, you know,
4 having them search for five per store actually gives
5 us a little bit more margin of effort in terms of
6 finding things that are relevant to the issues.

7 THE COURT: Right. And, again, I have the
8 concern about what is it really going to show, and I
9 agree, we don't know, but it does sound like the
10 depositions are really going to be what reveals
11 information.

12 All right, so as you guessed, based on that
13 discussion, I am going to grant the request to do the
14 production for class certification purposes on a
15 sampling basis but for 5 employees per store and
16 stipulation that whatever is found will be deemed
17 representative of the, the group of 960 as a whole for
18 class certification purposes.

19 MR. RUZAL: And, Your Honor, just to clarify,
20 and I know you had just said for class certification
21 purposes, but just to stress we'd like to ask for
22 class certification purposes only. We're not, we
23 would not stipulate that it would be representative
24 for all purposes of the litigation.

25 THE COURT: Well and if you are going to

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2 produce documents, if a class is certified and you
3 produce documents for all purposes at that point, then
4 I agree it should be only for class certification. Mr.
5 Moser, any different view?

6 MR. MOSER: No, that's fine. I just had two
7 questions regarding --

8 THE COURT: Sure.

9 MR. MOSER: Regarding the Court's order.
10 Number one, I, this does not affect the, the
11 substantive nature of any of the outstanding requests?

12 THE COURT: No, and I was actually going to
13 address that briefly or to the extent we can. But, no,
14 there is no, it is not meant in any way to limit the
15 scope of the documents requested or that are
16 appropriate to be produced. Obviously, defendants have
17 their objections, whatever objections they make, but
18 this is meant no way to restrict or expand the
19 substantive scope of discovery.

20 MR. MOSER: And the second question would be
21 that with regard to the class list, since the
22 methodology that they're proposing would require them
23 to produce a class list anyway from which we would,
24 from which we would select certain individuals
25 randomly using a consultant, does it mean that class

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2 information is only exchanged for the sample or do we
3 get a comprehensive class list, I think that's an open
4 issue that we'd like to address either separately with
5 the Court or, if the Court is so inclined, to address
6 it today.

7 THE COURT: Yes, Mr. Ruzal?

8 MR. RUZAL: Yeah, thank you, Your Honor. I
9 believe, respectfully, Mr. Moser presupposes that the
10 way in which the sample will be collected. My
11 understanding of a random sample is that it's exactly
12 that, it's random. I don't necessary understand how a
13 consultant can pick a random sample if a consultant
14 presumably would be used presumably to identify
15 certain particular individuals to select, random would
16 mean just that.

17 THE COURT: Well there are two different types
18 of random, right, so you can randomly select something
19 but depending on your universe and it affects whether
20 it is a representative sample that can be extrapolated
21 upon. And I was understanding the following, that the
22 sampling is based on an agreement, an acknowledgement
23 for purposes of class certification that that sample
24 will be treated as representative and expandable to
25 the class as a whole, so that there doesn't need to be

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2 a statistical assessment of how to go about choosing
3 the employees. Anyone see that to the contrary?

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MR. RUZAL: The defendant agrees, Your Honor.

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MR. MOSER: Yes, I agree, to the extent that,
6 you know, we come to this agreement that, you know, no
7 one is going to challenge whether the sampling is
8 representative for the purposes of the class motion.

9

THE COURT: Right.

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MR. MOSER: My, but in the emails from --

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THE COURT: Yes, I recall that the defendant,
12 I believe in a letter, represented, or maybe it was an
13 email, that the plaintiff, it would be at the
14 plaintiff's choosing which employees would be in the
15 sample, am I, do you recall differently --

16

MR. MOSER: That's correct, that they would
17 provide a class list. And the reason why --

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THE COURT: Well I don't know about that, but
19 I just meant that plaintiff would be doing the
20 selection, but let me ask Mr. Ruzal what he recalls
21 about that?

22

MR. RUZAL: Thank you, Your Honor. Well, look,
23 this process is storied, it's been ongoing for the
24 better, since basically October 15th and it started out
25 with a request for sampling. Mr. Moser created 16

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2 preconditions to consider sampling. We had agreed to
3 a, the far majority of these preconditions to try to
4 move forward with sampling and to avoid Your Honor's
5 intervention in this, and Mr. Moser didn't want to go
6 forward for a variety of reasons, fine, we find
7 ourselves here today.

8 Personally, Your Honor, there should have
9 never been any preconditions to sampling because it
10 was not, it's not a quid pro quo --

11 THE COURT: Well, I'm not, but we're not
12 talking about that right now, right now we're talking
13 about the class list and whether that should be
14 provided so that the plaintiff can select at their
15 choosing the employees, they really should be randomly
16 but it is being, I mean I don't know what the
17 plaintiff would know otherwise. But you said, Mr.
18 Moser, that you would do this in connection with a
19 consultant, why would you need a consultant to pick?

20 MR. MOSER: Because I think that what I would
21 like to avoid is either defendant, themselves, or the
22 plaintiffs cherry picking class members --

23 THE COURT: Well, I agree, but how --

24 MR. MOSER: The purpose, the reason why I
25 would hire a consultant is because I would hire the

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2 consultant exclusively for the purpose of simply
3 looking at the list and it can be in Excel format and
4 have that consultant randomly --

5 THE COURT: Randomly select.

6 MR. MOSER: Either using some type of script
7 or randomly selecting and stating in an affidavit that
8 these were randomly selected.

9 THE COURT: Okay, that seems like a reasonable
10 thing to do. Mr. Ruzal?

11 MR. RUZAL: If plaintiffs want to absorb the
12 expense (indiscernible) we had shared this in previous
13 email correspondences, I had asked Mr. Moser on
14 occasion why he thought the consultant was necessary,
15 I didn't nearly get as comprehensive an answer as he
16 provided to the Court today. That's perfectly --

17 THE COURT: I'm violating my own rule, I'm
18 sorry.

19 (Telephone Interruption)

20 THE COURT: Okay, go ahead.

21 MR. RUZAL: We have no strong objection to it,
22 just two comments if I may. I mean, one, to me, a
23 random sample is just that, random. I don't know why
24 plaintiffs would need a class list identifying all of
25 the individuals for purposes of the sample or how that

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actually --

THE COURT: Well how were you thinking of doing it otherwise?

MR. RUZAL: It could be anonymized, it could be, we could pick the individuals with the longest tenure at the respective stores to hopefully, you know, increase the likelihood that their file is going to be large --

THE COURT: Right, it could be anonymized, you're right.

MR. RUZAL: I think that probably is a bit more equitable, Your Honor.

MR. MOSER: Your Honor, if I may, I think the issue of the class list is, maybe we want to address that by separate letter --

THE COURT: Yes.

MR. MOSER: Because I think that there's some substantive issues here and one of them is that the defendant is suggesting that the people who know most about whether they were manual workers are actually the class members. So, you know, that may assist us in, you know, obtaining affidavits necessary for class certification.

THE COURT: Let's deal with the class list separately, fully meet and confer, if there's an issue raise

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it with me, but for the selection process, anonymization I think is appropriate and should be done, because that just reinforces the random nature of it.

All right, so in terms of the schedule, you each have proposed a schedule, I guess the defendants had proposed one that was based on there being sampling which is being done. So working within that framework, Mr. Moser, do you have any concerns about what they, I recognize we're already passed some of the dates so we'd need to extend accordingly, but assuming that we did that, do you have issues with it?

MR. MOSER: Yes, I would like some specificity as to when the defendants will be amending their responses because otherwise I think that that issue may just be prolonged unnecessarily.

THE COURT: Right, so there's the overall schedule and then there's interim dates, and one of them you're talking about is amending their responses, and you're talking about both document responses and interrogatories?

MR. MOSER: Correct, Your Honor, and requests for admissions to the extent that they believe that an amendment is necessary.

THE COURT: All right, Mr. Ruzal, can you speak to that?

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2 MR. RUZAL: Certainly, Your Honor. As we had
3 indicated to Mr. Moser which he, in turn, had
4 indicated in a footnote to his November 24th
5 submission, we were aiming to, to provide amended
6 responses to the interrogatories and document requests
7 by December 7th we believe was the date we provided.
8 We didn't set it at the time as a firm date, that we
9 were hoping to get it by then just because of the
10 intervening holiday and the other issues that we
11 prepared for the Court today, it's forthcoming --

12 THE COURT: Well, give me a date, what would
13 be a date certain?

14 MR. RUZAL: We could do December 7th, Your
15 Honor.

16 THE COURT: Okay, we'll do December 7th. All
17 right, and then any issues that exist after that
18 you'll meet and confer, and if you can resolve them,
19 great, if not, I'm here. So, with that, is there any
20 other issue with respect to the schedule proposed
21 which I believe is at DKT 37-1?

22 MR. MOSER: I noticed that the date to amend
23 is retroactive to November 4th and just for the Court's
24 information, we reached out to the defendant recently
25 because there's some very recent case law out of the

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2 Appellate Courts of the State of New York stating that
3 the statute of limitations was tolled by executive
4 order for a period of 230 days, approximately. And we
5 want to amend the complaint to, you know, the
6 complaint, as it is phrased right now, only asserts a
7 6 year statute of limitations and we wanted to extend
8 that by the 228 days that were recognized by the
9 Appellate Courts in the State of New York.

10 THE COURT: Mr. Ruzal?

11 MR. RUZAL: Well, first off, Your Honor,
12 defendant doesn't believe that Mr. Moser would need to
13 amend the complaint to achieve some sort of tack on
14 tolling to the extent that executive order actually
15 pertains here. Secondly, Your Honor, we don't believe
16 that particular case or the executive order would
17 apply here because Mr. Moser filed the complaint after
18 the height of the pandemic and I think he's,
19 respectfully, trying to utilize this executive order
20 and shoehorn this case to somehow extend the statute
21 of limitations where it really doesn't apply here. I
22 don't believe that there would be any equitable
23 advancement of interest, rather just to simply
24 increase the potential damages in this case.

25 Your Honor, I mean this would be something

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2 that I think would be more appropriate for briefing --

3 THE COURT: Oh, yeah, I'm not deciding now
4 whether it does or does not apply, the question is, is
5 whether there's any objection, whether it should be
6 and whether there's a need to include in an amended
7 pleading. And my initial reaction was the same as Mr.
8 Ruzal, that it is a legal event that would otherwise
9 apply to the statute of limitations, if it applies
10 here, that you'd be able to invoke that without
11 putting it in the complaint. Do you see it
12 differently, Mr. Moser?

13 MR. MOSER: Yes, absolutely. We'll bring to
14 the Court's, we'll bring to the Court's attention if a
15 motion to amend is necessary, specific case law out of
16 the Appellate Courts of the State of New York which
17 states that this is a true toll of the statute of
18 limitations, it's not a suspension, a suspension is
19 different --

20 THE COURT: No, no, I'm not arguing, I'm, my
21 question, sorry if I miscommunicated, just what your
22 position on whether it needs to be in the pleading as
23 opposed to something you can just invoke because it's
24 part of the limitations law.

25 MR. MOSER: I just, in an abundance of

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caution, I just don't want to be precluded or limited
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THE COURT: Of course.

MR. MOSER: From what's in the pleading, I
think that would, I would be not fulfilling my duties
to the class if I say, well, I said 6 years but what I
really meant was 6 years and 228 days, you know.

THE COURT: Right. Mr. Ruzal, why not have,
allow that to be done, but obviously you'd be
reserving all your rights to disagree with that
argument substantively?

MR. RUZAL: If that's how plaintiffs want to
proceed, I see that as their choice and so long as
we're not waiving arguments, as Your Honor points out,
then it's certainly fine by us.

THE COURT: Right. All right, so I'll allow
that amendment to be made without prejudice to any
arguments that the principle does not apply, or any
other argument defendant wants to make in regard to,
to it.

MR. RUZAL: Your Honor, if I may?

THE COURT: Yes.

MR. RUZAL: Is Mr. Moser suggesting that with
respect to any amendments to the first amended

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2 complaint, that it would be limited with respect to
3 the actual tolling argument, with respect to the
4 length of the statute of limitations?

5 THE COURT: That, that's my understanding at
6 the moment, Mr. Moser, is there anything else?

7 MR. MOSER: That is correct.

8 THE COURT: Okay, so that is the only thing
9 for which it shall be amended. And when do you think
10 you can file that?

11 MR. MOSER: I think I can file that within two
12 weeks.

13 THE COURT: Okay, let's do that. Anything
14 else about the schedule, Mr. Moser?

15 MR. MOSER: I'm sorry, Your Honor, I'm looking
16 through it as we speak.

17 THE COURT: That's okay.

18 MR. MOSER: I don't have, with regard to the
19 deadlines, themselves?

20 THE COURT: Yes.

21 MR. MOSER: I don't see any issues with regard
22 to the deadlines, themselves.

23 THE COURT: Okay. Was there something else
24 you had a concern about in there?

25 MR. MOSER: No, I'm just finishing it up right

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now.

THE COURT: Sure, take your time.

MR. MOSER: I have no other concerns about this order.

THE COURT: All right, so I will issue that order with a 60 day status report requirement and with the amendment that you can file the amended complaint as we've discussed. All right, I think I've heard what I saw out there, is there anything else that we should cover, Mr. Moser?

MR. MOSER: No, Your Honor, we will work with the defendants following their amendment of their discovery responses on December 7th and hopefully we can resolve everything without the Court's intervention. But in the event that we can't work it out, is there a deadline by which you would like to see a motion to compel or --

THE COURT: No, if you can't work something out just file a letter pursuant to my rules and we'll take it from there. And I think as I indicated, I did indicate previously in an order, just a reminder to the defendants that if there are going to be objections you have to be clear about what you're producing and not producing, that's all.

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All right, anything else from the defense?

MR. RUZAL: No, thank you, Your Honor.

THE COURT: All right, thank you, all, we're
adjourned.

MR. MOSER: Thank you.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Hess, et al. versus Bed Bath & Beyond, Inc., Docket #21cv4099, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Date: January 24, 2022